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March 5, 1998

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, N. W. – Room 222
Washington, D. C. 20554

RECEIVED
MAR - 5 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Ex Parte, CC Docket No. 97-100, Petition for Expedited Declaratory Ruling
Preempting Arkansas Public Service Commission Pursuant to Section
252(e)(5) of the Communications Act of 1934, as amended

Dear Ms. Roman Salas:

On March 4, 1998 Roy Hoffinger and the undersigned, representing AT&T, met with Alex Starr, Jonady Hom and Jonathan Askin of the Common Carrier Bureau's Policy and Program Planning Division. The purpose of the meeting was to discuss AT&T's response to specific questions the staff posed regarding the impact of Arkansas Public Service Commission Order No. 11 on the above-referenced proceeding. In addition, AT&T responded to staff's request for (1) a chronology of the AT&T/SWBT interconnection arbitration proceeding; (2) a copy of each of the Arkansas Commission's eleven orders therein; (3) a copy of each Arkansas Commission order approving or disapproving an interconnection agreement since August 1, 1997; and (4) a copy of AT&T's supplemental brief addressing the impact of Section 9(f) of Arkansas Act 77 to pending arbitration, filed with the Arkansas Commission on February 18, 1997.

AT&T's response to staff's questions, a chronology of the interconnection arbitration proceeding, and copies of the various publicly available documents listed above are attached to this notice.

Two copies of this Notice are being submitted to the Secretary of the FCC in accordance with Section 1.1206(a)(1) of the Commission's rules.

Sincerely,

A handwritten signature in cursive script, appearing to read "F. S. Simone".

ATTACHMENTS

cc: A. Starr
J. Hom
J. Askin

0+2

FCC ARKANSAS QUESTIONS

QUESTION NO. 1

What happens next in the arbitration proceeding? What further steps need to be taken, if any, before the Arkansas Commission issues a final, appealable order? Approximately when will those steps be completed? Do you anticipate that an appeal will be taken?

RESPONSE TO QUESTION NO. 1

The next steps in the arbitration proceeding would be for AT&T and SWBT to reach agreement on the impact of Order No. 11, execute an interconnection agreement reflecting the Arkansas Commission's ruling, and submit this executed agreement for approval by the Arkansas Commission. AT&T has already contacted SWBT to obtain SWBT's views on the impact of Order No. 11 on the interconnection agreement submitted to the Arkansas Commission on July 25, 1997. However, because parties will likely disagree on the scope of the Arkansas Commission's ruling, it is unlikely that AT&T and SWBT will be able to agree on contractual language. Thus, it is likely that AT&T and SWBT will present separate interconnection agreements to the Arkansas Commission for approval. Once the Arkansas Commission has approved an agreement, the agreement will be subject to appeal in federal district court under Section 252(e)(6).

QUESTION NO. 2

Did either SWBT or AT&T argue to the Arkansas Commission that "Act 77 and its impact on the [Arkansas] Commission's authority to arbitrate interconnection issues were not fully and appropriately addressed in Order No. 5"? See Order No. 11 at 2. If so, please describe the argument and bring copies of the pleadings that made the argument.

RESPONSE TO QUESTION NO. 2

AT&T did not make such an argument. AT&T is not aware of such an argument being made publicly by SWBT.

QUESTION NO. 3

After the Arkansas Commission issued Order No. 5, did either SWBT or AT&T urge the Arkansas Commission to adopt the reasoning or the results articulated in Order No. 11? If so, please describe the argument and bring copies of the pleadings that made the argument.

RESPONSE TO QUESTION NO. 3

AT&T did not. Indeed, AT&T pointed out to the Commission in CC Docket No. 97-100 that Act 77's requirement that the Arkansas Commission act in accordance with Sections 251 and 252, and the Commission's implementing regulations, required it to go beyond the "minimal" regulations established by the Commission in the *Local Competition Order*, and thus "should not restrict the ability of the PSC to implement the 1996 Act (see Question No. 6).

AT&T is not aware of such a public position by SWBT after the issuance of Order No. 5. Further, in a Supplemental Brief filed with the Arkansas Commission on February 18, 1997, and addressing the impact of Section 9(f), SWBT stated (at p. 2) that:

Nothing in Section 9(f) limits the [Arkansas] Commission's authority with respect to the instant arbitration. . . . [T]he Commission has the authority to rule on the issues raised by the parties in this arbitration.

QUESTION NO. 4

One of the Arkansas Commission's core conclusions in Order No. 11 is the following: "Pursuant to the restrictions on the Commission's authority in Act 77, the Commission has no authority to order SWBT to provide interconnection, resale or unbundling to AT&T on any different terms or conditions than SWBT will agree to provide such services to a competitor if those terms and conditions meet the minimum requirements for interconnection specified in Sec. 251 of the 1996 Act." Order No. 11 at (emphasis added). What is the source of the "minimum requirements" of section 251 to which the Arkansas Commission refers? Is it the language of section 251 itself, or the FCC's Local Competition Order (11 FCC Red 15499, Aug. 8, 1996), or both?

RESPONSE TO QUESTION NO. 4

AT&T does not know what sources the Arkansas commission believes it should consult in ascertaining the "minimum requirements" of Section 251. Neither Order No. 5 nor Order No. 11 specify the sources to which the Arkansas Commission believes it did or should refer, and AT&T has been unable to discern such sources from its analysis of Order No. 11 and the conclusions it reaches regarding the positions taken by the parties during the arbitration. AT&T believes that all of the positions it took before the Arkansas commission, including those which were accepted by that commission in Order No. 5 but

apparently rejected in Order No. 11, are required by the Act, and that many of the FCC's rules supported its positions.

AT&T believes that in attempting to ascertain the requirements of Section 251, the Arkansas commission was required by federal law to consider not merely the language of Section 251, but also the language of the Act as a whole, its legislative history, and "its object and policy," including its overall purpose of creating local competition.¹

QUESTION NO. 5

In light of Order No. 11, can the Arkansas Commission interpret for itself what constitutes the "minimum requirements" of section 251 in a manner that supplements or exceeds the requirements specified in the FCC's Local Competition Order? Put differently, does Order No. 11 indicate that the Arkansas Commission believes that section 9 of the Arkansas Act precludes the Arkansas Commission from imposing on incumbent LECs any interconnection, unbundling, or resale obligation beyond those specified in the Local Competition Order?

RESPONSE TO QUESTION NO. 5

Based on its analysis of the conclusions in Order No. 11, and comparing those conclusions with the analysis contained and conclusions reached in Order No. 5, AT&T believes that the Arkansas commission treated Act 77 as a mandatory rule of construction prohibiting it from interpreting the Telecommunications Act in such a manner that would require incumbent LECs to provide access and interconnection on any terms and conditions to which they do not agree. The Arkansas Commission's interpretation and application of Act 77 in Order No. 11 forecloses the possibility that the Arkansas commission believes that it is permitted by Act 77 to impose even those obligations specified in the FCC's Local Competition Order, unless SBC agrees to them. This is confirmed by the numerous respects in which the result that appears to have been mandated in Order No. 11 violates the FCC's Order. See, e.g., Question Nos. 7 and 10, *infra*.

QUESTION NO. 6

In its comments to ACSI's petition, AT&T stated:

[T]he 1996 Act authorizes and "requires" detailed regulation to implement the Act's core substantive provisions that access and interconnection be

¹ Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 220-21 (1986); see also Varity Corp. v. Howe, 116 S. Ct. 1065, 1070 (1996); Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 273 (1995); Board of Education v. Harris, 444 U.S. 130, 140 (1978).

provided at rates, terms and conditions that are just, reasonable and nondiscriminatory. For example, the Act may require a state commission to go beyond the "minimal" regulations established by the Commission's implementing regulations, as the Commission's . . . [Local Competition Order] recognizes. Thus, if properly construed, the Arkansas Act should not restrict the ability of the . . . [Arkansas Commission] to implement the 1996 Act.

AT&T Comments at 2 n.1 (emphasis added). Assuming, arguendo, that AT&T's statement was valid prior to Order No. 11, does it retain its validity after Order No. 11?

RESPONSE TO QUESTION NO. 6

AT&T believes that Act 77, as interpreted and applied by the Arkansas Commission in Order No. 11, is inconsistent with the Telecommunications Act, and has restricted the ability of the Arkansas Commission to perform the functions delegated to it by Congress in the Telecommunications Act. See Responses to Questions 5, 7, 8, 11 and 13; see also Order No. 11, at 5 ("[P]ursuant to Act 77, the commission has no authority to obtain information or investigate any financial information of SWBT, including cost studies to verify the accuracy of" SWBT's asserted costs for unbundled network elements).

QUESTION NO. 7

In its comments to MCI's petition, SWBT stated:

There is nothing in the Arkansas Act requiring the Arkansas PSC to limit the range of unbundled elements to those expressly delineated in the [FCC's Local Competition Order]; indeed, the Arkansas PSC has already directed SWBT to make available "elements" that were not required to be unbundled in this Commission's [Local Competition Order].

SWBT Comments at 16-17. Assuming, arguendo, that SWBT's statement was valid prior to Order No. 11, does it retain its validity after Order No. 11?

RESPONSE TO QUESTION NO. 7

AT&T believes that the SWBT statement quoted in Question No. 7 is not an accurate characterization of Act 77 as interpreted and applied in Order No. 11.

QUESTION NO. 8

As stated above, the Arkansas Commission concluded in Order No. 11 that it must approve the terms of interconnection, unbundling, and resale offered by SWBT as long as those terms meet the minimum requirements of section 251. In Order No. 11, the Arkansas Commission also "reverse[d] Order No. 5 on any interconnection, resale, and unbundling issues, with the exception of pricing, which adopted the position of AT&T." Order No. 11 at 5 (emphasis added). In Order No. 5, however, the Arkansas Commission often adopted the position of AT&T precisely because it believed that doing so was necessary to comply with the minimum requirements of section 251. See Order No. 5 at 7 (resale of promotions), 8-9 (resale of distance learning services), 9-11 (presumptive unreasonableness of resale restrictions), 25-28 (unbundling of dark fiber), 30-31 (unbundling of multiplexing and other services), 36-37 (collocation in butts and vaults), 37-38 (bill and keep method of reciprocal compensation), 38-39 (geographic scope of local calling areas), 40-41 (dialing parity for intra-ATA calls), 41-43 (access to poles, ducts, and conduits), 57 (equal access to services, UNEs, interconnection, and ancillary functions). How do you square the Arkansas Commission's professed standard of adherence to the minimum requirements of section 251, with the Arkansas Commission's reversal of all non-pricing decisions favoring AT&T, including apparently decisions rendered originally to meet the minimum requirements of section 251?

RESPONSE TO QUESTION NO. 8

As noted above, we believe that Order No. 11 reflects the Arkansas commission's belief that Act 77 prohibits it from interpreting the Telecommunications Act to require any term or condition for interconnection, access to unbundled elements and resale which is opposed by the incumbent LEC.

QUESTION NO. 9

In light of Order No. 11, must SWBT unbundle dark fiber?

RESPONSE TO QUESTION NO. 9

In Order Nos. 5 and 6, the Arkansas Commission found that it was technically feasible for SWBT to unbundle dark fiber and required it to do so. Because the Arkansas Commission found the unbundling of dark fiber to be technically feasible, AT&T believes that SWBT is required by the Telecommunications Act to make it available as an unbundled network element. Nevertheless, in Order No. 11, the Arkansas commission adopted only those terms and conditions "which are consistent with the terms and conditions SWBT has agreed to and which are in conformance with the positions taken by SWBT in the arbitration." Order No. 11, at 6. Thus, it appears that the Arkansas Commission would no longer require SWBT to unbundle dark fiber because SWBT did not "agree" to such unbundling.

QUESTION NO. 10

In light of Order No. 11, may the Arkansas Commission continue to consider all resale restrictions to be presumptively unreasonable, including restrictions contained in SWBT's tariffs?

RESPONSE TO QUESTION NO. 10

We think this is unlikely.

QUESTION NO. 11

Are the reasoning and result of Order No. 11 based only on section 9(f) of the Arkansas Act? If not, please describe what and how other sections of the Arkansas Act are involved.

RESPONSE TO QUESTION NO. 11

No. Although Order No. 11 is based primarily on section 9(f), its reasoning relies on the entirety of section 9, as well as other sections of Act 77. For example, the Arkansas Commission notes that its treatment of pricing of unbundled network elements in the arbitration orders (Order Nos. 5, 6) reflected its limited authority under section 9(e), as well as under Sections 6, 7, 8 and 11. See Response to Question No. 6, supra. In addition, we believe that the conclusions of Order No. 11 were also influenced by sections 9(d)(services subject to resale obligations) and 9(g)(determination of wholesale discount).

QUESTION NO. 12

Assuming, arguendo, that Order No. 11 reflects the Arkansas Commission's view that section 9 of Act 77 precludes the Arkansas Commission from imposing on incumbent LECs any interconnection, unbundling, or resale obligation beyond those specified in the Local Competition Order, should the FCC preempt section 9 pursuant to either section 253 of the Communications Act or the FCC's "conflict" preemption authority under the Supremacy Clause? Please explain your response in detail.

RESPONSE TO QUESTION NO. 12

As a preliminary matter, AT&T does not believe that the Arkansas commission construed Act 77 to allow it to resolve issues in a manner that is consistent with the FCC's Rules, unless SBC agreed with such resolution. See Response to Question 5, supra. In all events, the FCC's Local Competition Order is not, was not intended to be, and, under the reasoning of the 8th Circuit's decision in Iowa Utilities Board v. FCC, could not be a

complete statement of the parties' rights and obligations under the Telecommunications Act. Accordingly, if Act 77 is construed to withhold from the Arkansas commission the authority to consider and adopt any argument that an incumbent LEC is required by the Telecommunications Act to do or refrain from doing something that is not specified in the Local Competition Order, then the Arkansas commission is incapable of performing the functions delegated to it by Congress in Section 252. See Response to Question No. 13, infra.

Furthermore, to the extent that Act 77 and/or Order No. 11 reflect determinations by the Arkansas legislature and/or the Arkansas commission that an incumbent LEC is not required by the Telecommunications Act to do or refrain from doing something that is not specified in the Local Competition Order, then Order No. 11 would appear to be subject to "conflicts" preemption.

QUESTION NO. 13

To whom does the Communications Act delegate the authority to determine whether an arbitrated interconnection agreement meets the requirements of section 251, the States or state commissions? If the latter, please explain whether the Communications Act precludes a State from directing its state commission to deem the requirements of section 251 and the requirements of the FCC's Local Competition Order to be the same.

RESPONSE TO QUESTION NO 13

The Telecommunications Act delegates this function to "state commissions," but a state commission can and will act only as authorized by the legislature of its state. In recognition of this fact, Congress provided a mechanism in Section 252(e)(5) for implementation of the Telecommunications Act in the event that a state commission lacked the authorization necessary to perform in accordance with the substantive provisions of the Act the functions delegated to it in Sections 252(b)(c) and (e).

* * *

In addition to comprehensive responses to the foregoing questions, we would appreciate receiving: (i) a bare-bones chronology of the AT&T/SWBT interconnection arbitration proceeding; (ii) a copy of each of the Arkansas Commission's eleven orders therein (excluding Orders 5, 6, and 11); and (iii) a copy of each Arkansas Commission order approving or disapproving an interconnection agreement since August 1, 1997.

The requested materials are being provided herewith.

AT&T-SWBT Arbitration Proceedings

06/11/96	AT&T requests interconnection with SWBT
11/15/96	AT&T files petition for arbitration with the Arkansas Commission.
11/22/96	ALJ Bradshaw designated as arbitrator. Order No. 1.
12/10/96	SWBT responds to arbitration petition.
1/21/97 - 1/24/97	Arbitration hearings.
2/4/97	Act 77 enacted. SWBT "elects" alternative regulatory treatment pursuant to Section 6 (b) of Act 77.
2/10/97	AT&T and SWBT file post-hearing briefs with Last Best Offers (LBOs).
2/18/97	AT&T and SWBT file supplemental briefs addressing the impact of Section 9(f) of Act 77 to pending arbitration.
2/28/97	ALJ Bradshaw issues Order No. 5.
3/11/97	Arkansas Commission issues Order No. 6 affirming Order No. 5 without modification. AT&T and SWBT to submit an interconnection agreement incorporating the commission's final decision within 45 days.
3/11/97 - 7/25/97	AT&T and SWBT attempt to negotiate language of interconnection agreement.
3/28/97	AT&T files application for rehearing.
4/9/97	SWBT files application for rehearing.
4/14/97	Arkansas Commission denies AT&T and SWBT petitions for rehearing.
4/18/97	Arkansas Commission extends deadline for filing interconnection agreement to May 23, 1997. Order No. 8.
5/23/97	AT&T and SWBT file separate interconnection agreements.
6/11/97	Arkansas Commission dismisses separate interconnection agreements and directs AT&T and SWBT to file a single interconnection agreement by June 30, 1997.
6/26/97	Arkansas Commission extends deadline for filing interconnection agreement to July 25, 1997.
7/25/97	AT&T and SWBT file interconnection agreement in three parts. Part A includes contractual language agreed upon by the parties. Part B includes arbitrated issues upon which the parties cannot agree. Part C includes issues AT&T believes were resolved, but SWBT contends were not at issue in the arbitration. AT&T, pursuant to AT&T's response to Issue No. 14 on page 40 of Part C, files its Unbundled Network Element Pricing Dispute Memorandum.
2/18/98	Arkansas Commission issues Order No. 11.

Arkansas Public Service Commission Order Nos. 1 through 11

AT&T/SWBT Interconnection Arbitration Proceeding

Docket No. 96-395-U

ARK. PUBLIC SERV. COMM.
JAN. SANCHEZ
SECRETARY OF COMM.

Nov 22 3 22 PM '96

ARKANSAS PUBLIC SERVICE COMMISSION

FILED

IN THE MATTER OF AT&T COMMUNICATIONS)
OF THE SOUTHWEST, INC.'S PETITION FOR)
ARBITRATION OF UNRESOLVED ISSUES WITH)
SOUTHWESTERN BELL TELEPHONE COMPANY)
PURSUANT TO SEC. 252(b) OF THE)
TELECOMMUNICATIONS ACT OF 1996)

DOCKET NO. 96-395-U
ORDER NO. 1

O R D E R

On November 15, 1996, AT&T Communications of the Southwest, Inc. (AT&T) filed a Petition for Arbitration pursuant to 47 U.S.C. §252(b) of unresolved issues in the interconnection negotiations between AT&T and Southwestern Bell Telephone Company (SWBT). AT&T filed a Motion for Order Setting Procedural Schedule and Adopting Protective Order on the same date. In its Motion, AT&T proposes a procedural schedule for the arbitration including testimony filing dates and post-hearing briefs.

On November 20, 1996, SWBT filed a Response to AT&T's Motion. SWBT concurs with the proposed procedural schedule of AT&T with some recommended changes. SWBT contends the proposed modifications will expedite the arbitration and discovery process.

In the Motion of AT&T and the Response of SWBT, both parties request the entry of a Protective Order to expedite the discovery process. The request for a Protective Order will be addressed in a subsequent order in this Docket.

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PAGE -2-

Pursuant to Sec. 252(b)(3) of the 1996 Act, SWBT shall file a response to AT&T's Petition on or before 2:00 p.m. on Tuesday, December 10, 1996. SWBT shall include in its response to the Petition a brief or other written statement addressing the disputed issues, including an explanation of how SWBT's position on the disputed issues complies or fails to comply with Sec. 251 of the 1996 Act and the applicable FCC rules. SWBT shall also include in its response all documents or information relevant to the disputed issues. The response shall be served on AT&T on the same date it is filed with the Commission.

The Commission hereby designates Sarah M. Bradshaw as the Arbitrator in the above-styled Docket. The Arbitrator shall have the authority to conduct the arbitration in accordance with the procedures herein, establish any necessary schedule, rule on all motions, and issue interlocutory and final orders or reports in this Docket. Any party to the Docket objecting to the final report or order of the Arbitrator shall file written objections within ten (10) days of the date the final order or report of the Arbitrator is filed with any documentation or information relied upon by the party. The Commission shall approve or modify the Arbitrators report no later than March 11, 1997, in accordance with Sec. 252(e)(4)(c) of the 1996 Act.

The parties to this Docket are AT&T and SWBT. No intervention by persons or entities not a party to the negotiation will be permitted.

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The parties to this Docket may engage in discovery pursuant to the Commission's Rules of Practice and Procedure, with the exception that responses to data requests should be provided within seven days, unless the party requesting the information specifies a longer period for response to the data requests. Discovery requests and responses need not be filed in the Docket, however, discovery requests and responses shall be provided to the Arbitrator on the same date they are served on the other party. Discovery requests which are not responded to may be submitted to the Arbitrator, with a request that the Arbitrator order discovery. The request for an order compelling discovery shall specify why the information is necessary for arbitration of the disputed issues.

An arbitration hearing will be held at 9:30 a.m. on Tuesday, January 21, 1997, in Commission Hearing Room No. 1, First Floor, Public Service Commission Building, 1000 Center Street, Little Rock, Arkansas. A prehearing conference is hereby scheduled for 10:00 a.m. on December 12, 1996, in Commission Hearing Room No. 2. Only counsel for the parties are required to attend the prehearing conference. Counsel for the parties should be prepared to address the number of witnesses and the order in which the witnesses will be called and other procedural issues affecting the arbitration process.

AT&T and SWBT shall file initial testimony on or before 2:00 p.m. on Friday, December 20, 1996. Rebuttal testimony shall be filed by both parties on or before 2:00 p.m. on Thursday, January

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9, 1997. The parties shall file a prehearing joint issues memorandum on or before 2:00 p.m. on Friday, January 17, 1997. Post hearing briefs shall be filed by AT&T and SWBT on or before 2:00 p.m. on Friday, February 7, 1997.

Rule 2.07 of the Commission's Rules of Practice and Procedure is hereby suspended for all filings by SWBT and AT&T in this Docket. SWBT and AT&T shall file an original and five copies of any pleadings, testimony and exhibits.

The Arbitrator is directed to conduct the arbitration on a final offer basis, selecting one party's final offer on each of the disputed issues. The Arbitrator should make her recommendations to the Commission in accordance with this procedure.

The parties are encouraged to continue negotiations of the disputed issues during the arbitration process. Should the parties reach a negotiated resolution of any of the disputed issues, the parties should immediately inform the Arbitrator of the issue or issues resolved.

BY ORDER OF THE COMMISSION.

This 22nd day of November, 1996.

Sam J. Bratton, Jr.
Sam J. Bratton, Jr., Chairman

Patricia S. Qualls
Patricia S. Qualls, Commissioner

Julius D. Kearney
Julius D. Kearney, Commissioner

Shelley Jackson/Acting
Jan Sanders
Secretary of the Commission

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to Ark. Code Ann. §23-2-316 and Rule 13.05 of the Commission's Rules of Practice and Procedure. SWBT and AT&T are hereby directed to negotiate the scope and limits of dissemination of the proprietary information to persons employed by AT&T or SWBT. Within the Commission, access to the proprietary information shall be limited to the Arbitrator, the technical consultant assisting the Arbitrator, the Commissioners and necessary members of the Commissioners' professional and administrative staff.

With the exception of testimony and exhibits containing proprietary information, sealed, proprietary information in response to data request or sealed, proprietary information which is part of any pleading or response herein need not be filed in the record. Any pleading or response filed should reference the proprietary information and state that the proprietary information has been provided to the Arbitrator and the other party. Sealed proprietary information, with the exception of testimony, should be provided directly to the Arbitrator and the other party with a copy of this order attached to the sealed information.

Testimony and exhibits which contain proprietary information shall be filed under seal with a copy of this order attached thereto. Either party may request that proprietary information which is not contained in filed testimony or exhibits be placed in the record under seal during the scheduled hearing.

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The parties are reserved the right to challenge the designation of materials as confidential during the proceedings in this Docket.

BY ORDER OF THE ADMINISTRATIVE LAW JUDGE PURSUANT TO DELEGATION.

This 25TH day of November, 1996.

Melba Jones (Acting)
Jan Sanders
Secretary of the Commission

Sarah M. Bradshaw
Sarah M. Bradshaw
Administrative Law Judge

I hereby certify that the following order issued by the Arkansas Public Service Commission has been served on all parties of record this date by U. S. mail with postage prepaid, using the address of each party as indicated in the official docket file.

Jan Sanders
Jan Sanders
Secretary of the Commission
Date 11-25-96

AR PSC SEC

Fax: 501-682-1717

Feb 6 '97 13:33 P.01

ARMED AND DANGEROUS
SUSPECT

ARKANSAS PUBLIC SERVICE COMMISSION FEB 6 1 21 PM '97

11-22-55

IN THE MATTER OF AT&T COMMUNICATIONS
OF THE SOUTHWEST, INC., PETITION FOR
ARBITRATION OF UNRESOLVED ISSUES WITH
SOUTHWESTERN BELL TELEPHONE COMPANY
PURSUANT TO SEC. 252(B) OF THE
TELECOMMUNICATIONS ACT OF 1996


DOCKET NO. 96-395-U
ORDER NO. 3

O R D E R

The Motion to Amend Procedural Schedule filed by AT&T Communications of the Southwest, Inc. on February 6, 1997, should be and hereby is granted.

BY ORDER OF THE ADMINISTRATIVE LAW JUDGE PURSUANT TO
DELEGATION.

This 4 day of February, 1997.


Sarah M. Bradshaw
Administrative Law Judge

Glenn Hooks (acting)
Jan Sanders
Secretary of the Commission

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JAN. 1997

ARKANSAS PUBLIC SERVICE COMMISSION

FEB 14 1 54 PM '97

FILED

IN THE MATTER OF AT&T COMMUNICATIONS
OF THE SOUTHWEST, INC.'S PETITION FOR
ARBITRATION OF UNRESOLVED ISSUES WITH
SOUTHWESTERN BELL TELEPHONE COMPANY
PURSUANT TO SEC. 252(b) OF THE
TELECOMMUNICATIONS ACT OF 1996

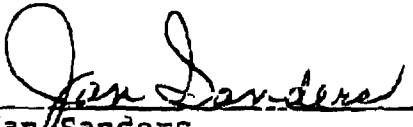
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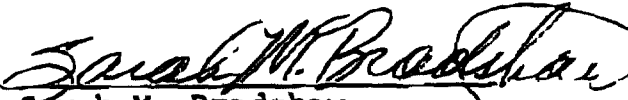
ORDER

The parties to the above-styled Docket are hereby directed to file supplemental briefs on or before 3:00 p.m. on Tuesday, February 18, 1997, addressing the interpretation and applicability of Section 9(f) of Act 77 of 1997 to the pending arbitration.

BY ORDER OF THE ADMINISTRATIVE LAW JUDGE PURSUANT TO DELEGATION.

This 14th day of February, 1997.


Jan Sanders
Secretary of the Commission


Sarah M. Bradshaw
Administrative Law Judge

ARKANSAS PUBLIC SERVICE COMMISSION

IN THE MATTER OF AT&T COMMUNICATIONS)	DOCKET NO. 96-395-U
OF THE SOUTHWEST, INC.'S PETITION FOR)	ORDER NO. <u>5</u>
ARBITRATION OF UNRESOLVED ISSUES WITH)	
SOUTHWESTERN BELL TELEPHONE COMPANY)	
PURSUANT TO §252(b) OF THE)	
TELECOMMUNICATIONS ACT OF 1996)	

ORDER

On November 15, 1996, AT&T Communications of the Southwest, Inc. (AT&T) filed a Petition for Arbitration pursuant to §252(b) of the Telecommunications Act of 1996 (1996 Act), 47 U.S.C. §252(b). In its Petition, AT&T sought compulsory arbitration to establish an interconnection agreement between AT&T and Southwestern Bell Telephone Company (SWBT). AT&T delivered its request for negotiation of an interconnection agreement pursuant to 47 U.S.C. §252(a) to SWBT on June 11, 1996.

On Nov. 22, 1996, the Commission entered Order No. 1, designating Sarah M. Bradshaw, Administrative Law Judge (ALJ), as the arbitrator in this Docket. The Commission scheduled the arbitration hearing to begin on January 21, 1997. The Commission directed that the arbitration be conducted on a final offer basis with the Arbitrator selecting one party's final offer on each issue. AT&T and SWBT submitted their last best offers (LBO) on each of the disputed issues in conjunction with the post-hearing briefs filed on February 10, 1997.

On December 10, 1996, SWBT filed a Response to the Petition of AT&T pursuant to 47 U.S.C. §252(b).

The 1996 Act establishes a national procompetitive telecommunications policy designed to encourage competition in the provision of local exchange telecommunications services and to encourage the rapid deployment of advanced telecommunications services. To facilitate this policy, incumbent local exchange carriers (ILEC) are required to negotiate in good faith with competitive local exchange carriers (CLECs) the terms and conditions of interconnection agreements to allow CLECs to provide local exchange telephone service in areas served by the ILECs. Pursuant to 47 U.S.C. §251(b) all local exchange carriers (LECs) are obligated to provide resale of telecommunications services, number portability, dialing parity and access to rights-of-way. In addition, ILECs have a duty to negotiate in good faith terms and conditions to fulfill the duties to; provide interconnection of facilities with the ILECs network, provide access to network elements on an unbundled basis, offer telecommunications services for resale at wholesale rates, provide reasonable notice of changes affecting the ILECs services, and provide physical collocation of equipment necessary for interconnection or access to unbundled network elements where space is available.

Pursuant to 47 U.S.C. §251(d)(1), on August 8, 1996, the Federal Communications Commission (FCC) released its First Report and Order in CC Docket No. 96-98 (FCC Order) adopting regulations to implement the requirements of 47 U.S.C. §251. The FCC Order and the Rules have been appealed and the Eighth Circuit Court of Appeals issued an order on October 15, 1996, staying a portion of the rules pending judicial review. The stay affects only the FCC's pricing rules and the "pick and choose" rule. The stay order does not affect any other provisions

of the FCC's rules or the First Report and Order implementing 47 U.S.C. §251. With the exception of the rules which have been stayed, the FCC Order and the rules are applicable to this proceeding pursuant to 47 U.S.C. §252(c).

The 1996 Act provides that during the period from the 135th to the 160th day after the date the ILEC receives a request for negotiations, a party to a negotiation for interconnection to provide local exchange service may request that the Commission arbitrate any unresolved issues.

In resolving the open issues in an arbitration, the 1996 Act provides that a state commission shall:

(1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) PRICING STANDARDS.-

(1) INTERCONNECTION AND NETWORK ELEMENT CHARGES.-

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section-

(A) shall be-

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) CHARGES FOR TRANSPORT AND TERMINATION OF TRAFFIC.-

(A) IN GENERAL.-For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a

State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless-

(I) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) RULES OF CONSTRUCTION.-This paragraph shall not be construed-

(I) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) WHOLESALE PRICES FOR TELECOMMUNICATIONS SERVICES.-For the purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

Act 77 of 1997 (Act 77), the Arkansas Telecommunications Regulatory Reform Act of 1997, was enacted on February 4, 1997, after the conclusion of the arbitration hearing on January 24, 1997. Act 77 allows ILECs to choose deregulation of their rates and revenues. The rates and tariffs of such electing ILECs become effective upon filing and are not subject to complaint

or investigation. Act 77 prescribes the terms and pricing the Commission shall require ILECs to use in providing interconnection or resale of services to a CLEC in Arkansas. The Act provides that:

(d) Except to the extent required by the Federal Act and this Act, the Commission shall not require an incumbent local exchange carrier to negotiate resale of its retail telecommunications services, to provide interconnection, or to sell unbundled network elements to a competing local exchange carrier for the purpose of allowing such competing local exchange carrier to compete with the incumbent local exchange carrier in the provision of basic local exchange service. Promotional prices, service packages, trial offerings, or temporary discounts offered by the local exchange carrier to its end-user customers are not required to be available for resale.

(e) The prices for unbundled network elements shall include the actual costs, including an allocation of joint and common costs and a reasonable profit.

(f) As provided in Sections 251 and 252 of the Federal Act (47 USC 251 and 252), the Commission's authority with respect to interconnection, resale, and unbundling is limited to the terms, conditions and agreements pursuant to which an incumbent local exchange carrier will provide interconnection, resale, or unbundling to a CLEC for the purpose of the CLEC competing with the incumbent local exchange carrier in the provision of telecommunications services to end-user customers.

(g) The Commission shall approve, as permitted by the Federal Act, resale restrictions which prohibit resellers from purchasing retail local exchange services offered by a local exchange carrier to residential customers and reselling those retail services to nonresidential customers, or aggregating the usage of multiple customers on resold local exchange services, or any other reasonable limitation on resale to the extent permitted by the Federal Act. The wholesale rate of any existing retail telecommunications services provided by local exchange carriers that are not exempt from Section 251(c) of the Federal Act (47 USC 251(c)) and that are being sold for the purpose of resale, shall be the retail rate of the service less any net avoided costs due to the resale. The net avoided costs shall be calculated as the total of the costs that will not be incurred by the local exchange carrier due to it selling the service for resale less any additional costs that will be incurred as a result of selling the service for the purpose of resale.

Under the provisions of the Federal Act, AT&T seeks to enter the local exchange telecommunications market in competition with SWBT through resale of SWBT's service and the purchase of unbundled network elements (UNEs) from SWBT. The interconnection agreement is the document which embodies the rates, terms and conditions governing the exchange of traffic between AT&T and SWBT, resale of service, UNEs, and all other elements of the agreement between AT&T and SWBT which will allow AT&T to provide local exchange service in areas where SWBT provides local exchange service. The interconnection agreement is essentially a contract between AT&T and SWBT for a term of three years with two optional one year extensions.

Prior to the hearing, AT&T and SWBT jointly filed a statement of the issues and the position of the parties on each issue. The parties presented approximately 141 unresolved issues subject to arbitration. During the hearing, the parties resolved some issues through continued negotiations and AT&T withdrew its opposition to SWBT's position on some issues. Each party submitted its LBO in conjunction with its post-hearing brief filed on February 10, 1997.

With final issue arbitration, the ALJ has adopted the LBO of one of the parties on each issue as the resolution of the issue which is to the greatest extent possible in compliance with the applicable law and rules and supported by substantial evidence. Although this is final issue arbitration, it has been necessary to make some adjustments to LBOs to provide consistency to the decision due to the conflicting and sometimes redundant statement of the issues by the parties. In a few limited instances, modifications to LBOs were necessary to provide a decision